PETITIONER'S BRIEF.

Petitioner completely overlooks the question of the jurisdiction of the Supreme Court of Missouri to entertain petitioner's motion to transfer, when the record affirmatively shows that the court had lost jurisdiction because such motion was filed after the term had expired at which the cause was finally decided by that court, and after the mandate had gone down. He merely contends that Rule 24 of the Supreme Court of Missouri does not apply to motions to transfer directed to the court's discretion under the last clause of Section 4 of the 1890 Amendments to Article VI of the Missouri Constitution, and that, therefore, motions to transfer on discretionary grounds do not have to be filed within ten days after the overruling of the motion for rehearing. Even in this he is in error.

Section 4 of said Amendments provides:

> "When the judges of a division are equally divided in opinion in a cause, or when a judge of a division dissents from the opinion therein, or when a federal question is involved, the cause, on the application of the losing party, shall be transferred to the court for its decision; *or when a division in which a cause is pending shall so order, the cause shall be transferred to the court for its decision*" (Italics ours).

Rule 24 of the Supreme Court of Missouri, which fixes the time for filing motions to transfer, is as follows:

> "A motion to transfer a cause under the provisions of the Constitution from either division to court *en banc* must be filed within ten days after the final disposition of the cause by the division, and notice of such motion shall be given as provided in Rule 23."

The Supreme Court of Missouri in *Scheuffler* v. *Manufacturer's Lumbermen's Underwriters*, 349 Mo. 855, 163 S. W. 2d 750, stated:

> "Under the last clause of this Section (referring to Section 4 above), either division, *on application* or its own motion and for reasons deemed sufficient though not enumerated in the Section, may order a cause transferred to the court *en banc*" (Italics ours).

It will be noted that Rule 24 fixes the time for filing of motions to transfer "under the Constitution." The Scheuffler case holds that under the last clause of Section 4 of the constitutional provisions above quoted, either division *on application* may order the transfer. It will also be noted that the Osment opinion by this Court recognized that a motion to transfer, based on the last clause of Section 4, must be filed in order to exhaust the appellate review provided by Missouri law.

Since, therefore, a motion to transfer must be filed to exhaust appellate review under Missouri law, and since a motion to transfer on discretionary grounds is a motion to transfer under the Constitution, Rule 24, which fixes the time for filing motions to transfer, applies, and such a motion is not timely filed unless filed within the ten days provided by the rule. The construction of the Missouri Constitution and Rule 24, which petitioner urges, would lead to the abominable result that in every case decided by a division of the Supreme Court of Missouri, no matter how long ago, a motion to transfer on discretionary grounds would be in time, no matter when filed. Petitioner has simply failed to exhaust the appellate review provided by state law, by failing to act in time, and his untimely motion to transfer does not give this court jurisdiction in this cause.

On Page 5 of his petition and brief, petitioner states that the Supreme Court of Missouri "upon consideration of the motions of petitioner and respondent sustained

respondent's motion to strike." The record fails to show that petitioner's motion to transfer was considered. The fact that the court struck it from the files affirmatively shows that it was not considered. The record only shows that respondent's motion to strike was considered (R. 588).

On Page 12 of his petition and brief, petitioner argues that leave to file the motion granted by the Chief Justice of the court *en banc*, "and by entertaining this motion," the court demonstrated that it had retained jurisdiction over this case. The granting of leave to file an untimely motion does not constitute an entertainment of such motion on its merits sufficient to give this court jurisdiction.

Gypsy Oil Company v. *Escoe*, 275 U. S. 498, 72 L. Ed. 393.

Pfister v. *Northern Illinois Fin. Corp.*, 317 U. S. 144, 87 L. Ed. 123.

Benard's v. *Johnson*, 314 U. S. 19 (l. c. 31), 86 L. Ed. 11 (l. c. 19).

The motion was not entertained but was stricken from the files. Also under the Scheuffler opinion the Chief Justice of the court *en banc* did not have the *power* to grant the leave and court *en banc* had no power to entertain the motion, because such a motion or leave to file such a motion must be filed in the Division which decided the case.

We, therefore, urge that the untimely motion of petitioner to exhaust the appellate review provided by state law, which motion was not entertained on its merits, does not give this court jurisdiction, and the petition for certiorari should be denied for want of jurisdiction.

II.

Even If This Court Has Jurisdiction the Petition for a Writ of Certiorari Should Be Denied.

Petitioner does not argue his petition on the merits but incorporates by reference his brief on his first petition for certiorari. For the court's convenience we are repeat-

ing here what we said in our brief on the first petition on this point.

The decision of the Missouri court is that a master is not liable under the Federal Employers' Liability Act for an act of horseplay of his servant, known to be addicted to horseplay, when committed outside the scope of his employment and where liability is predicated on the theory that he retained a dangerous servant in his employ and on the theory that the master failed to protect another servant from such an act. That decision is in harmony with the following applicable decisions of this court:

In *Davis* v. *Green,* 260 U. S. 349, an employee of a railroad, known to be dangerous, while acting outside the scope of his employment, shot and killed another employee of the railroad. The theory of recovery under the Federal Employers' Liability Act was the employment of a dangerous man. This Court in denying liability said:

> "The ground on which the railroad company was held was that it had negligently employed a dangerous man, with notice of his characteristics, and that the killing occurred in the course of the engineer's employment. But neither allegations nor proof present the killing as done to further the master's business or as anything but a wanton and wilful act, done to satisfy the temper or spite of the engineer. Whatever may be the law of Mississippi, a railroad company is not liable for such an act under the statutes of the United States. The only sense in which the engineer was acting in the course of his employment was that he had received an order from Green which it was his duty to obey—in other words, that he did a wilful act wholly outside the scope of his employment, while his employment was going on. We see nothing in the evidence that would justify a verdict unless the doctrine of *respondeat superior* applies."

After the Green case, the plaintiff in *Atlantic Coast Line* v. *Southwell,* 275 U. S. 64, seeking to avoid the ef-

fect of the decision of this Court in the Green case, based his right to recover under the Federal Employers' Liability Act for the death of an employee caused by another employee acting outside the scope of his employment, on the employer's failure to prevent the death where the master knew of bad feeling between the employees. The Court in denying the right of recovery said:

> "* * * In view of the decision in *Davis* v. *Green*, 260 U. S. 349, 67 L. Ed. 299, 43 Sup. Ct. Rep. 123, the plaintiff did not attempt to hold the petitioner liable as principal in the act, but relied upon its *failure to prevent the death.*
>
> * * * * * * *
>
> "It is not necessary to state the facts in detail. Those mainly relied upon are that Fonvielle, the general yardmaster, knew that Southwell, the man who was killed, on previous occasions had used threatening language to Dallas, who shot Southwell; that Fonvielle knew or ought to have known that they were likely to meet when they did; that Fonvielle was with Dallas, his subordinate, just before that moment and that Dallas said to him, 'Cap., all I want to do is to ask Southwell to lay off of me and let me alone,' and that Fonvielle said that he must not see Southwell, that if he saw him and talked to him he might bring about unpleasant consequences; that Fonvielle left Dallas and after having gone a short distance saw him and Southwell approaching each other and had taken a few steps towards them with a view to separating them in case of an altercation, but that before he had time to reach them the shot was fired. Fonvielle knew that Dallas had a pistol, but there was a strike at the time, Dallas was a special policeman and had a right to carry it and not unnaturally did. The only sinister designs of which there is any evidence were of Southwell against Dallas, unless Dallas' remark just before the shooting be taken to foreshadow the event, which it certainly did not seem to until after the event had happened. It appears to us extravagant to hold the petitioner liable in a case like this."

The Green and Southwell decisions completely dispose of petitioner' contentions here that there is liability at common law for (1) the retention of a man known to be addicted to horseplay where his act of horseplay causing injury was outside the scope of his employment and (2) failure to protect against such an act of such a man.

Petitioner seeks to enlarge the master's common law duty to protect Osment from Stalac's act outside the scope of his employment, by claiming that the master here had assumed the duty of protection against acts of an employee outside the scope of his employment, by creating a special service department. His petition (R. 2) does not plead the rules of the special service department by which it is erroneously claimed such an assumed duty arose. In Missouri, where it is sought to enlarge the master's common law duties by rules, the rules must be pleaded which was not done. *Nivert* v. *Wabash R. Co.*, 232 Mo. 626, *Kirkland* v. *Bixby*, 282 Mo. 462, and *Martin* v. *Wabash Ry. Co.*, 325 Mo. 1107.

Further, the first and second grounds of negligence alleged in the petition, as set out on page 4 of this brief, are based on the retention of Stalac. The third ground of negligence, which is based on Finnell's failure to act, with time, means and opportunity at hand to prevent the injury after Osment's peril arose, was not submitted to the jury (R. 297) and petitioner took no appeal from the action of the trial court's refusal to submit. Also we contend that the rules should not be interpreted as raising a duty to Osment beyond that imposed by the common law and were never intended for that purpose. They were the rules of a separate department and Osment did not know what they were (R. 135). We also contend that Finnell's failure to act was not the proximate cause of Osment's injury. Osment's witnesses agree that Osment did not cry out or struggle, he did not change appearance until he dropped to the ground, and there was nothing in his actions or appearance that indicated that he was in any

trouble or difficulty until he dropped to the ground (R. 33, 44, 45, 50).

But regardless of these contentions, there is no liability here. In *St. Louis & S. F. Ry.* v. *Mills,* 271 U. S. 344, it was contended that because the Railway Company furnished a guard to protect an employee on his way home during a strike, that the Railway Company was liable for the employee's death caused by one of the strikers in the presence of the guard. This court held that there is no duty growing out of the relationship of employer and employee requiring the employer to guard the employee, and that the fact that the employer voluntarily provided some protection against apprehended danger did not give rise to an inference that it undertook to do more. The Court further held that it would not do for the jury to speculate on what would have happened if additional guards had been present. In the course of its opinion this court said:

> "* * * There was no evidence that petitioner had ever furnished decedent or any other employee with more than one guard in going to or from work; or any other evidence from which it could be inferred that petitioner had undertaken, or held itself out as undertaking, to furnish more protection to the decedent or its other workmen 'than it actually did furnish.'
>
> "The respondent here asserts that the defendant, having assumed to do something, should have done more. But the bare fact that the employer voluntarily provided some protection against an apprehended danger, by undertaking to do something which involved no special knowledge or skill, can give rise to no inference that it undertook to do more. Respondent therefore relies on the breach of a duty which does not exist at common law, and of whose genesis in fact it offers no evidence."

Thus the Green, Southwell and Mills cases, decided by this court, establish: (1) that the master is not liable for the assault by a known dangerous employee upon

another where the act is not committed in the scope of the dangerous employee's employment or in furtherance of the master's business; (2) that even though the master has knowledge of the dangerous characteristics of an employee, and even though he may anticipate that those characteristics will bring about a situation where someone is apt to be hurt, the master is under no duty to prevent or protect against an act which was not done in the course of the master's business; (3) that even though the master may anticipate danger to the employee from the acts of others, either not employees or employees acting outside the scope of employment, and even though the master may assume some duty to protect against those acts, that assumption does not make the master an insurer, or require him to give more protection than he has actually assumed to give.

Petitioner in his brief on his first petition for certiorari which he incorporates in his present brief cites *Fletcher* v. *B. & P. R. Co.*, 168 U. S. 135, 42 L. Ed. 411, as authority for the proposition that a master has a duty to control his servant while acting outside of the scope of his employment. The liability in that case was not predicated on the duty of a master toward his servant, but was based on the duty of a railroad toward members of the public who may be lawfully using the street. Briefly the facts were as follows:

For a period of several years the defendant railroad had given its express consent that workmen, returning home at the close of the day's work, might take home for firewood odd pieces of bridge timber, ties, etc., which were left over after repairing the road. The railroad had consented that these odd pieces might be thrown off the moving train at points nearest the homes of the respective men, with the admonition that the men must be careful not to hurt anyone in throwing the wood off. Plaintiff was employed in the shop of the railroad and had finished

his day's work and was walking home along the street when a piece of timber was thrown from the train, striking and injuring plaintiff after it rebounded on the street.

The question for consideration was, as stated in the opinion page 140, "whether the company was guilty of an omission of the duty which it owed the plaintiff, as one of the public lawfully using the street where the track was." Although the plaintiff was employed in the defendant's shops, yet, at the time of the injury, he had finished his work and was walking along the street toward his home and his status was that of "one of the public lawfully using the street."

The opinion of the Court in holding the defendant liable is not controlling here for a number of reasons, to-wit: (1) It was decided prior to the *Green, Southwell* and *Mills cases, supra;* (2) it did not arise under the Federal Employers' Liability Act, nor did it involve the relation of master and servant between plaintiff and defendant; (3) it involved the duty of a common carrier to persons using public streets and any reference to private property is dictum; (4) express consent was given by the railroad for the act done; (5) it was based on a practice or custom which was neither pleaded, proved nor relied on in the case at bar; and (6) although decided in 1897, it has never been cited by any United States court as upholding the doctrine contended for by the plaintiff here.

The decision of Division Two of the Missouri Supreme Court is in harmony with the *Green, Southwell* and *Mills cases, supra,* decided by this Court and the petition for a writ of certiorari should be denied.

Conclusion.

We respectfully submit that this Court has no jurisdiction to review the decision of Division Two of the Missouri Supreme Court and further that even if it has jurisdiction the Missouri decision not only does not conflict

with the decisions of this Court but is in accord with them, and the petition for certiorari should be denied.

Respectfully submitted,

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EXHIBIT I.

Be It Remembered that on the 11th day of the regular November Term, 1942 of the Circuit Court of Jackson County, Missouri, at Kansas City, the same being the 21st day of November 1942, the following proceedings were had and made of record before Honorable Paul A. Buzard, Judge of Division No. 8 in the cause entitled:

Eugene W. Osment, Respondent Plaintiff, Vs. Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers of the Wabash Railway Co., a Corp., Appellants Defendants. No. 469553

Now on this day there is received and filed herein in the Mandate of the Supreme Court of Missouri, reversing the judgment of this court heretofore on the 7th day of June, 1940, entered herein in Record Book 817 at page 29 of this court in favor of plaintiff (Respondent) and against the defendant (Appellant) in the sum of $50,000.00.

Wherefore, it is ordered and adjudged by the court in accordance with said Mandate filed herein, the judgment aforesaid be, and the same is hereby set aside and for naught held, and that said defendants (Appellants) go hence discharged without day and recover of and from said plaintiff (Respondent) its costs herein and that execution issue therefor.

State Of Missouri County Of Jackson SS.

I, Bernard T. Flannery, Clerk of the Circuit Court, within and for the County and State aforesaid, do hereby certify that the foregoing is a full, true and complete copy of the Filing Of The Mandate And The Judgment Rendered Thereon and it is further certified that after a

search of the index in this cause no further entries appear on this date, November 4th, 1943.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, in my office in Kansas City, Missouri, this 4th day of November, 1943.

Bernard T. Flannery,
Clerk,
By M. L. Shipp,
Deputy.

(Seal)